United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2352

To be argued by
GERALD J. BARRE

In The

United States Court of Appeals

For The Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELIN GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

vs.

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Remand from the Supreme Court of the United States.

BRIEF FOR DEFENDANTS-APPELLEES SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 AND SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND

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POINT V

THE COMPLAINT IS FATALLY DEFECTIVE BECAUSE OF NON-COMPLIANCE WITH F.R.C.P. 8(A) IN THAT:

(a) WICGU FAILED TO ALLEGE THAT IT HAD A CAUSE OF ACTION UNDER TITLE VII IN ITS OWN RIGHT; FAILED TO NAME ITS MEMBERS AS REPRESENTATIVE PARTIES REQUIRED BY F.R.C.P. RULE 23.2;

(b) PLAINTIFFS IN ACTION AGAINST SSEU AND SSEU WELFARE FUND FAILED TO ALLEGE ISSUANCE OF "*RIGHT TO SUE*" LETTERS PRIOR TO INSTITUTION OF SAID ACTION;

(c) PLAINTIFFS FAILED TO PLEAD FACTS SUPPORTING JURISDICTIONAL PREREQUISITES NECESSARY IN CLASS ACTIONS OF (1) NUMEROSITY, (2) COMMONALITY, (3) REPRESENTIVITY, AND (4) TYPICALITY;

(d) PLAINTIFFS IN ACTION AGAINST SSEU FAILED TO PLEAD THAT THEY HAD RECEIVED PAYMENT FOR DISABILITIES UPON WHICH ACTION WAS BASED AND THEREFORE HAD NO CAUSES OF ACTION PERSONALLY IN THEIR OWN RIGHT AND THEREFORE COULD NOT SUE AS REPRESENTATIVE OF A CLASS WHO HAVE NOT BEEN SO PAID;

(e) PLAINTIFFS FAILED TO PLEAD IN ACTIONS AGAINST SSEU AND SSEU WELFARE FUND THAT THEY HAD FILED CHARGES AGAINST SAID DEFENDANTS WITH E.E.O.C. NAMING THEM AS SUCH; NOR EXHAUSTION OF THEIR REMEDIES UNDER TITLE VII;

(f) PLAINTIFFS IN ACTION AGAINST SSEU AND SSEU WELFARE FUND FAILED TO PLEAD THAT DEMAND HAD BEEN MADE FOR PAYMENT OF DISABILITY BENEFITS PRIOR TO INSTITUTION OF ACTION;

(g) PLAINTIFFS FAILED TO MAKE A TIMELY MOTION UNDER RULE 11A(c) OF THE RULES OF THE DISTRICT COURT FOR A DETERMINATION UNDER F.R.C.P. RULE 23(c)(1) FOR A CLASS DETERMINATION, A DEFECT PRECLUDING THE MAINTENANCE OF THE ACTION AND PROSECUTING THIS APPEAL

TABLE OF AUTHORITIES

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER and LINDA SHAH, on behalf of themselves and others similarly situated,

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BRIEF FOR APPELLEES SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 AND SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND

PRELIMINARY STATEMENT

This case is before the Court upon order of the United States Supreme Court vacating the judgment of this Court and remanding same for further consideration in light of

General Electric Co. v. *Gilbert*, 429 U.S. _____, 97 S.Ct. 401 (1976).

This case originally came before this Court upon an appeal filed by Plaintiffs-Appellants, WOMEN IN CITY GOVERNMENT UNITED (WICGU) and fourteen municipal employees alle[illegible] behalf of themselves and others similarly situated, from an order and judgment of the United States District Court for the Southern District of New York, rendered by the Honorable WHITMAN KNAPP, on October 10, 1974, dismissing the Appellants' complaint (313a).[1/]

Before argument of the appeal this Court rendered a decision in *Communications Workers of America, AFL-CIO et al* v. *American Tel. & Tel. Co., Long Lines Dept.*, 513 F.2d 1024 (1975) ("CWA Case") and based thereon, plaintiffs-Appellants moved this Court to summarily vacate the order of the District Court and remand this action to the District Court for further proceedings not inconsistent with said decision which motion was granted.

It was from this order and opinion defendants-appellees SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND petitioned the United States Supreme Court for a Writ of Certiorari for review thereof which was granted and resulted in a remand to this Court as first above set forth.

1/ References to the Joint Appendix for the original appeal will be cited as " a."

COUNTERSTATEMENT OF THE ISSUES PRESENTED AFFECTING SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 AND SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND

1. Does the complaint state a cause of action as a matter of substantive law?

a. Is excluding pregnancy and related conditions from fringe benefit plan coverage proscribed discrimination under Title VII of the Civil Rights Act of 1964 as amended (Title VII)?

b. Is it proscribed discrimination to provide a benefit to individuals who, because of physiology, would be the only ones affected thereby?

c. What does *invidious discrimination* mean in context of Title VII as it relates to pregnancy and related conditions?

d. Does discrimination on grounds of sex (or gender) mean something different when the 14th Amendment is involved than when Title VII comes into play?

2. Does the complaint state a cause of action as a matter of procedural law?

a. Under Rule 8(a) of the Federal Rules of Civil Procedure, ("FRCP") must a plaintiff in a sex discrimination case based upon pregnancy plead that the acts complained of were intentional and purposeful deprivation of specific rights and if so, is the failure to so plead a fatal defect to the complaint?

b. Under Rule 8(a) of the Federal Rules of Civil Procedure, must a plaintiff in a Title VII action plead that she has filed charges against the defendants with the Equal Employment Opportunity Commission ("EEOC") and specifically allege the names of the defendants against whom such charges were filed?

c. Under Rule 8(a)(1) of the Federal Rules of Civil Procedure, must a plaintiff in a Title VII action plead exhaustion of her remedies granted by the Civil Rights Act of 1964?

d. Under Rule 8(a)(1) of the Federal Rules of Civil Procedure, must a plaintiff in a Title VII action plead the grounds upon which the court's jurisdiction depends by alleging the issuance of "*right to sue*" letters prior to the institution of said action?

e. Under Rule 8(a) of the Federal Rules of Civil Procedure, must a plaintiff allege demand for payment of disability benefits prior to institution of action under Title VII?

f. Under Rule 8(a) of the Federal Rules of Civil Procedure, was the plaintiff WICGU required to plead that it had a cause of action in its own right under Title VII naming members as representative parties as required by Rule 23.2 of the Federal Rules of Civil Procedure?

g. Under Rule 8(a) of the Federal Rules of Civil Procedure, must a plaintiff, seeking redress under Title VII, who wishes to maintain a class action, plead the facts of numerosity, commonality, representivity and typicality as prerequisites to there being jurisdiction?

3. Does the institution of an action under Title VII, prior to the issuance of "*right to sue*" letters render such action jurisdictionally defective?

4. Is a Welfare Fund which is not an employer, labor organization or employment agency a proper party defendant in a Title VII action?

5. Does the plaintiff, WOMEN IN CITY GOVERNMENT UNITED ("WICGU") have capacity to sue and if it is not a protected person under Title VII, may it nevertheless be representative of a class of litigants of which it is not a member?

6. May a plaintiff who has already been paid for the disabilities upon which an action is brought continue to maintain the same in her own right and/or as representative of a class who have not been so paid?

7. Is the failure to make a timely motion under 11A(c) of the Rules of the District Court for a class determination under Rule 23(c)(1) of the Federal Rules of Civil Procedure a defect precluding the maintenance of an action and the prosecuting of the instant appeal?

8. Since the disputed policy of the plan of the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND was changed, effective January 1, 1973, more than a year prior to the institution of the action hereunder, should not the maintenance of the action have been rejected as *moot*?

9. Since Plaintiffs-Appellants advised Judge Knapp by letter of October 9, 1974 of their election not to amend their complaint to allege that defendants' exclusion of disability benefits for pregnancy and pregnancy-related disabilities was adopted as a pretext for sexual discrimination, aren't they foreclosed from resurrecting any such issues on this remand at this time, the same having been waived and not being properly before this Court?

CONSTITUTIONAL PROVISIONS, STATUTES,
RULES AND REGULATIONS INVOLVED.

These are set forth in an Addendum to this brief

("Addendum") infra pp.....48

COUNTERSTATEMENT OF THE CASE

The Appellants commenced this action on January 17, 1974, based upon alleged sex discrimination. While a motion to dismiss the complaint made by the Appellees concerned in this brief was pending before the Honorable WHITMAN KNAPP, the United States Supreme Court issued its decision in *Geduldig* v. *Aiello*, (hereinafter referred to as "*Aiello*") 417 U.S. 484 94 S. Ct., 2485 (1974) 8 FEP Cases 97, and based thereon, Judge Knapp *sua sponte*, after considering various arguments and positions of counsel for the parties, (232a) (233a) dismissed the complaint with leave to amend (290a) (309a) (314a). The Appellees concerned in this brief pressed time and again for a ruling on their motion since the issues raised were sufficient to warrant dismissal of the complaint on its merits for want of jurisdiction, improper parties plaintiff, improper parties defendant, failure to plead facts sufficient to constitute a cause of action, failure to timely move for a class determination and other fatal defects. (100a). No ruling thereon was ever made.

The reason assigned by Judge Knapp for dismissing with leave to amend was so he could certify a question to this Court and to enable appellants to move for leave to appeal. (303a). Such leave was denied.

The Appellants then advised Judge Knapp that they did not intend to amend and accordingly, Judge Knapp signed an order on October 10, 1974, dismissing the complaint with prejudice, which order is the subject of this appeal. (314a).

The Appellants then moved that argument on this appeal be heard together with that permitted in *CWA* v. *A.T.&T. Co.*, in which the complaint was dismissed by Judge Knapp simultaneously with the complaint herein. Such application was also denied by this Court.

Appellants then suggested to this Court that the appeal herein be heard *en banc* but this was also denied.

Before argument of the appeal, this Court rendered a decision in *Communications Workers of America, AFL-CIO et al* v. *American Tel. & Tel. Co. Long Lines Dept.*, 513 F.2d. 1024 (1975) and based thereon Plaintiffs-Appellants moved this Court to summarily vacate the order of the District Court and remand this action to the District Court for further proceedings not inconsistent with said decision which motion was granted.

It was from this order and opinion that the defendant-appellees SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND petitioned the United States Supreme Court for a Writ of Certiorari for review thereof which was granted and resulted in a remand to this Court as indicated in the Preliminary Statement.

The title of the action names as parties defendant a City, two mayors, a city personnel director, two municipal corporations, one municipal authority, one Board of Education, two insurance companies, three municipal labor organizations

representing public employees and three welfare funds affiliated with the three named labor organizations.

The plaintiffs consist of an organization, WOMEN IN CITY GOVERNMENT UNITED (WICGU) whose status and ability to entertain and maintain the action *as well as the remand of the appeal*, has been seriously challenged as well as certain women allegedly suing in behalf of themselves and others similarly situated.

The causes of action against the different defendants vary except to the extent that they may affect several of defendants, at best, generally (because they are a municipality or agency or entity thereof; insurance companies, municipal labor organizations, welfare funds) and yet, even then, are inapplicable *specifically* because of difference of fact, organization and status.

So, in essence, the plaintiffs have succeeded in creating what may have been their original intent, the *"grand-daddy"* of all litigation in size and scope in the area of sex discrimination. The conclusion seems inescapable in attempting to rationalize or even justify the utter chaos and confusion of fact, issues and law which has resulted from this one all-encompassing litigation.

If the intent were not evident, then to assess the candor of the Appellants, reference need only be made to Appellants' original Statement of the Case as it related to the defendants, SOCIAL SERVICE EMPLOYEES UNION LOCAL 371

(hereinafter sometimes referred to as "SSEU") and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND (hereinafter sometimes referred to as "SSEU WELFARE FUND") at page 7 of their original brief, "*defendants Social Service Employees Union Local 371 and Social Service Employees Union Local 371 Welfare Fund...have not **even** served answers.*" *(Emphasis Added)* The word "*even*" would suggest that those defendants have done nothing, were, or are in default. What the Appellants have not told this Court is that these defendants have most vigorously opposed this action as sham and frivolous as it affects them, and presents the issues enumerated in defendants-appellees counterstatement of the issues set forth in this brief, for consideration by this Court at this time.

POINT I

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AND WAS PROPERLY DISMISSED

The issue in this case is and has always been whether the complaint stated a cause of action. The defendants-appellees SSEU and SSEU WELFARE FUND have contended and still contend that it does not by reason of (a) substantive law; and, (b) procedural law.

At the time Judge Knapp rendered his decision and order [from which the original appeal herein was taken (290a)] and at the hearing held prior thereto, it was an accepted fact that the complaints, in both actions which the decision and order were determinative of, contained similar allegations (293a) and were drawn on the original theory of the complaint in *Geduldig* v. *Aiello*, 417 U.S. 484, 94 S. Ct. 2485 ("*Aiello*") such theory being that mere discrimination against pregnant women as such constituted *prohibited* discrimination under The Civil Rights Act of 1964, Title 42, Section 2000e et seq. of the United States Code ("Title VII") (234a), (237a), (281a) (282a) (294a) (300a).

When the Supreme Court rendered its decision in *Aiello*, (a Fourteenth Amendment case) Judge Knapp was presented with the issue of whether the reasoning of that case was applicable to this case (a Title VII case) by reason of certain language employed therein.

The Supreme Court in *Aiello* observed (at 4908):

> *"We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups who are eligible for disability insurance protection under the program."*

Judge Knapp found the key to the Court's decision in footnote 20 to the above quoted sentence noting (295a) that it flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender). In the first paragraph of that footnote the Court, in answer to arguments presented by the dissenting justices, observed:

> *"The dissenting opinion to the contrary, this case is thus a far cry from cases like* Reed *v.* Reed, *404 U.S. 71, and* Frontiero *v.* Richardson, *411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition - pregnancy - from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in* Reed, *supra, and* Frontiero, *supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretext designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."*

In the second paragraph, the Court synthesized its position:

> *"The lack of identity between the excluded disability and gender as such under this*

> *insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups - pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."*

Judge Knapp noted in his decision (295a) that at oral argument counsel for plaintiff insistently argued that *Aiello* was distinguishable on many grounds. He then found (298a) that the holding [that California's treatment of pregnancy-related disabilities did not in and of itself constitute a discrimination based on sex (or gender)] precluded relief under Title VII even more clearly than under the Fourteenth Amendment since under the Amendment it would be open to argument that it was irrational to single them out as a class (even if the singling out were not sex related) whereas no such argument was open under Title VII, which deals with discrimination "*because of...sex*" (42 U.S.C. §2000e(2)(a)(1).

Thus, Judge Knapp concluded that under Title VII "*disparity of treatment based on pregnancy does not in and of itself constitute such discrimination*" (299a) [proscribed discrimination under Title VII] (matter in brackets added).

This Court believed Judge Knapp to be in error in his interpretation of this issue of substantive law and summarily, prior to argument to an appeal thereof, vacated his order and remanded the case for further proceedings not inconsistent with this Court's decision in the *CWA* case which

was predicated upon the view of this Court that "...*Aiello is not decisive of the issues raised by this complaint under Title VII...*"

The defendants-appellees herein sought review and while their Petitions for Certiorari were pending; the Supreme Court rendered its decision in *General Electric Co.* v. *Gilbert* 429 U.S._____97 S.Ct. 401 (1976) ("*Gilbert Case*"), which finally and dispositively settled the issue of whether the rationale of "*Aiello*" was applicable to Title VII cases and whether "*the exclusion of such pregnancy-related disability benefits from General Electric's employee disability plan violated Title VII...*" The Supreme Court found that it did not and reversed.

In its decision the Court stated:

> "*...we decided Geduldig* v. *Aiello, 417 U.S. 484 (1974), where we rejected a claim that a very similar disability program established under California law violated the Equal Protection Clause of the Fourteenth Amendment because that plan's exclusion of pregnancy disabilities represented sex discrimination. The majority of the Court of Appeals felt that Geduldig was not controlling because it arose under the Equal Protection Clause of the Fourteenth Amendment, and not under Title VII, 519, F. 2d, at 666-667. The dissenting opinion disagreed with the majority as to the impact of Geduldig, 519 F. 2d, at 668-669. We granted certiorari to consider this important issue in the construction of Title VII.*
>
> *Section 703(a)(1) provides in relevant part that it shall be an unlawful employment practice for an employer*
>
> *'...to discriminate against*

> *any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin,' 42 U.S.C. §2000e-2.*
>
> *While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicates that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term 'discrimination,' which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar from the concerns which Congress manifested in enacting Title VII. We think, therefore, that our decision in Geduldig v. Aiello, supra, dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex..."*

After referring to specific portions of its opinion in *Aiello* the Court went on to state:

> *"The quoted language from Geduldig leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability benefits plan was not in itself discrimination based on sex.*
>
> *We recognized in Geduldig, of course, that the fact that there was not sex-based discrimination as such was not the end of the analysis, should it be shown ' that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other,' 417 U.S., at 496-497, n. 20. But we noted that no semblance of*

such a showing had been made:

> *"There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' 417 U.S., at 496-497.*

Since gender-based discrimination had not been shown to exist either by the terms of the plan or by its effect, there was no need to reach the question of what sort of standard would govern our review had there been such a showing. See Frontiero *v.* Richardson, *411 U.S. 677 (1973);* Reed *v.* Reed, *404 U.S. 71 (1971).*

The Court of Appeals was therefore wrong in concluding that the reasoning of Geduldig *was not applicable to an action under Title VII. Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under §703 (a)(1), 42 U.S.C. §2000e-2(a)(1)* Geduldig *is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all.*

There is no more showing in this case than there was in Geduldig *that the exclusion of pregnancy benefits is a mere 'pretext designed to effect an invidious discrimination against the members of one sex or the other.' The Court of Appeals expressed the view that the decision in* Geduldig *had actually turned on whether or not a conceded discrimination was 'invidious' but we think that in so doing it misread the quoted language from our opinion. As we noted in that opinion, a distinction which on its face is not sex related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination. But we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one*

race or sex. Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition, 375 F. Supp. at 375, 377. We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women. The contrary arguments adopted by the lower courts and expounded by our dissenting brethren were largely rejected in Geduldig...

As in Geduldig, supra, respondents have not attempted to meet the burden of demonstrating a gender-based discriminatory effect resulting from the exclusion of pregnancy-related disabilities from coverage." (Emphasis added).

In the complaint before this Court there is absolutely no allegation that the acts complained of were mere pretexts designed to effect an invidious discrimination against women. Moreover, plaintiffs refused to amend their complaint when offered an opportunity to amend their complaint to include such allegations (314a). They are foreclosed and absent such allegations, the complaint fails to state a cause of action.

The main predominant thrust of Plaintiffs-Appellants' brief is that there is no factual record and that there should be a full trial. We wholly fail to understand what purpose would be served in trying a case or conducting pre-trial procedures if there are no triable issues raised by the pleadings or if the complaint is fatally defective in that it fails to allege pretexts to effect an invidious discrimination, especially when the plaintiff is foreclosed from amending by reason of their voluntary waiver of the same after being

afforded by the Court the opportunity to do so.

Plaintiffs-Appellants present an argument at Page 8 and Point I of their brief that the Supreme Court has never held that a pregnancy classification having a substantially disproportionate impact on women is valid under Title VII and that they intend to prove that defendants' plans have a grossly disproportionate impact on women. This seems to be a quarrel with the Supreme Court for rendering the *Gilbert* decision and a misconstruction of what the court held. In this regard it stated:

> *"...For all that appears, pregnancy-related disabilities constitute an **additional** risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded **inclusion** of risks. To hold otherwise would endanger the common-sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here." (Emphasis added).*

Not only does the complaint fail to allege that a denial of disability benefits resulting from pregnancy has a disproportionate impact on women, but assuming that it did, the same would not alone constitute proscribed discrimination under Title VII in light of the above language since the Supreme Court has stated that there is no facial-based discrimination even though underinclusion (or for that matter non-inclusion) impacts, as a result of pregnancy-related

disabilities, more heavily upon one gender than upon the other.

POINT II

THE PLAINTIFF, WOMEN IN CITY GOVERNMENT UNITED, HAS NO CAPACITY TO SUE; IS NOT A PROTECTED PERSON UNDER TITLE VII; AND NOT BEING A PROTECTED PERSON MAY NOT BE REPRESENTATIVE OF A CLASS OF LITIGANTS OF WHICH IT IS NOT A MEMBER. PLAINTIFFS, LINDA SHAH, SUSAN PADWEE, LINDA ZISES, PAMELA MILLS, SUSAN PASS, EMILY BLITZ HAVE NO CAPACITY TO SUE AND ARE IMPROPER PARTIES TO MAINTAIN A CLASS ACTION.

WOMEN IN CITY GOVERNMENT UNITED (hereinafter referred to as "WICGU") has failed to allege that it represents anyone who would be included within the alleged class and therefore, it is ineligible to represent the alleged class, *National Welfare Rights Organization* v. *Wyman*, 304 F. Supp. 1346 (E.D.N.Y., 1968). WICGU has failed to allege that it or any of its members have suffered any injury, damage or discrimination at the hands of the defendants, *Wilson* v. *Kelley*, 294 F. Supp. 1005 (N.D. Ga., 1968), aff'd 393 U.S. 266 (1968), nor does WICGU have the requisite standing to bring an action under 42 U.S.C. 2000e-5(f)(1) in its own right since it is not an aggrieved person within the meaning of the said Civil Rights Act and was not capable of being discriminated against and has no standing, *Thomas* v. *Clarke*, 54 F.R.D. 245 (D.C. Minn., 1971); *Price* v. *Skolnik*, 54 F.R.D. 261 (D.C.N.Y., 1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F. 2d 727 (3d Cir., 1970).

As more particularly set forth in POINT VII hereof,

with respect to "*mootness*," both plaintiffs, SHAH and PADWEE have received a disability benefit from the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND for disability resulting from pregnancy. They cannot be plaintiffs in this action as there is no injury to them for which they can seek relief, *Wilson* v. *Kelley*, 294 F. Supp. 1005, (N.D. Ga., 1968), aff'd 393 U.S. 266 (1968). Each named plaintiff must have standing to bring the action, *Thomas* v. *Clarke*, 54 F.R.D. 245, (D.C. Minn., 1971); *Price* v. *Skolnik*, 54 F.R.D. 261 (D.C.N.Y., 1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir., 1970).

Since plaintiffs, ZISES, MILLS, PASS and BLITZ have not received "*right to sue*" letters as more particularly set forth in POINT III hereof, they similarly have no standing to bring the action individually or representatively.

POINT III

THE COURT HAS NOT JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION UNDER TITLE VII SINCE THE JURISDICTIONAL PREREQUISITE OF THE ISSUANCE OF "*RIGHT TO SUE*" LETTERS PRIOR TO THE INSTITUTION OF THE ACTION HAD NOT BEEN MET, NOR HAVE THE PLAINTIFFS ALLEGED DEMAND AND REFUSAL.

The Civil Rights Act of 1964, Title 42, Section 2000e et seq., United States Code, provides for certain prerequisite events before a private party can bring a civil action under the Act. Section 2000e-5(f)(1) states, in part:

> *"If a charge filed with the Commission ...is dismissed by the Commission, or if... the Commission has not filed a civil action under this section...or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission...shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (a) by the person claiming to be aggrieved..."*

None of the seven (7) named plaintiffs alleging causes of action against the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND alleged in their complaint that they had received notice from the Equal Employment Opportunity Commission as provided above. Three of the seven, PASS, BLITZ, AND WICGU did not allege that they had ever filed charges with the Equal Employment Opportunity Commission and the remaining four, MILLS, ZISES, PADWEE and SHAH, did

not indicate that their charges named either the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 or the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND as respondents. (2a)

There can be no question that a right to sue notice issued pursuant to 42 U.S.C. 2000e-5(f)(1) is a prerequisite to a Federal District Court acquiring jurisdiction in a Title VII action, *Patterson* v. *Newspaper Mail Deliveries Union*, 7 FEP cases 260, (S.D.N.Y., 1974); *Love* v. *Pullman*, 404 U.S. 522 (1972); *Johnson* v. *Seaboard Coast Line Railroad*, 404 F.2d 645 (4th Cir., 1968), cert. den. 394 U.S. 918; *Stebbins* v. *Continental Insurance Co.*, 442 F.2d 843 (D.C. Cir., 1971); *McDonald* v. *General Mills, Inc.*, 7 FEP cases 66 (E.D. Cal., 1974); *Gilbert* v. *General Electric Co.*, 59 F.R.D. 267 (E.D. Vir., 1973).

Of course, failure to *file* a charge with the Equal Employment Opportunity Commission will also defeat the jurisdiction of this Court in a Title VII action, *Richardson* v. *Miller*, 446 F.2d 1247 (3rd Cir., 1973); *Griffin* v. *Pacific Maritime Ass'n.*, 478 F.2d 1118 (9th Cir., 1973); *Jerome* v. *Viviano Food Co.*, 7 FEP Cases 143 (E.D. Mich., 1973), aff'd 489 F.2d 965; *Perrino* v. *Southern Bell T. & T. Co.*, 3 FEP Cases 307 (S.D. Fla., 1970) aff'd. 440 F.2d 791.

Further, the Complaint gives no indication that those plaintiffs who did file charges with the Equal Employment Opportunity Commission, *named* either the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 or the SOCIAL SERVICE

EMPLOYEES UNION LOCAL 371 WELFARE FUND in those charges. It is clearly a jurisdictional prerequisite to a suit under Title VII that a charge be filed against the party to be sued. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, (7th Cir., 1969); *Richardson* v. *Miller*, 446 F.2d 1247, (3rd Cir., 1971); *Beverly* v. *Lone Star Lead Constr. Corp.*, 437 F.2d 1136 (5th Cir., 1971); *Tuma* v. *American Can Co.*, 6 FEP Cases 573, (D.C.N.J., 1973); *Edmonson* v. *Wackenhut Corp.*, 2 FEP Cases 39 (M.D. Fla., 1968).

It is respectfully submitted, that this Court lacks subject matter jurisdiction over the claims asserted under Title VII, Civil Rights Act of 1964 as against the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND. Title VII has not been complied with by the plaintiffs asserting Title VII claims against these two defendants.

Two of the plaintiffs, SHAH and PADWEE, were paid. (115a, 116a) The remaining five plaintiffs, ZISES, MILLS, PASS, BLITZ and WICGU, failed to plead that they had even demanded disability benefits from the SSEU WELFARE FUND.

The recent case of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) is instructive with respect to the necessity of this demand. *McDonnell Douglas* was a case involving a claim of racial discrimination under Title VII of the Civil Rights Act of 1964. The Court held that:

> *"The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing...that he applied and was qualified for a job for which the employer was seeking applicants;...that, despite his qualifications, he was rejected..."* (5 FEP, cases 970)

If the facts of demand and refusal are necessary elements of a Title VII discrimination case, they are necessary allegations of a Title VII complaint. See *McDonald* v. *General Mills, Inc.*, 7 FEP Cases 66, 70 (D.C. Cal., 1974), where the Court stated:

> *"I nonetheless feel constrained to point out that a recently decided Supreme Court case, cited by none of the parties, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817, 5 F.E.P. Cases 965 (1973), casts considerable doubt on the viability of plaintiff's claim as presently set forth in her complaint. In that case, involving alleged racially discriminatory employment practices, Justice Powell enunciated the elements of a prima facie case in a Title VII action as follows: 'The complainant in a Title VII trial must carry the initial burden under the statute (Civil Rights Act of 1964) of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that* ***he applied*** *and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications' 36 L.Ed. 2d at 677, 5 F.E.P. Cases at 969 (emphasis added). In the case at bar, plaintiff has* ***not alleged*** *in her complaint (1) that she ever applied or asked to be interviewed at the college placement office by the defendants, (2) that she ever applied for employment with the defendants, or (3) that any of the defendants has refused to hire her because of her sex or for any*

> *other reason. She alleges only that she sought to use the services of the Sacramento State College Graduate Placement Center and was 'deterred from making application for employment and seeking an interview' with representatives of the defendants. Without deciding, it appears that plaintiff has not established a prima facie case, in that she has* ***failed to allege*** *that she actually applied for either an interview or a job with any of the defendants. In the event plaintiff is able to overcome the jurisdictional defects in this case and decides to file a new action, the standards enunciated in McDonnell Douglas Corp. v. Green should be given careful consideration.*
>
> "IT IS ORDERED *that this action be, and the same is hereby, dismissed for lack of subject matter jurisdiction."* (Emphasis supplied) (7 FEP Cases 66, 70)

That Court's reasoning is commended to this Court and the Court is respectfully urged to hold that this Complaint is defective with respect to the SSEU and the SSEU WELFARE FUND for want of these necessary allegations.

POINT IV

A WELFARE FUND WHICH IS NOT AN EMPLOYER, LABOR ORGANIZATION OR EMPLOYMENT AGENCY IS NOT SUBJECT TO TITLE VII AND IS THEREFORE NOT A PROPER PARTY DEFENDANT IN AN ACTION THEREUNDER.

42 U.S.C. Section 2000e-5(f)(1), provides, in part, that:

> *"If a charge filed pursuant to subsection (b) of this section is dismissed by the Commission, or if...the Commission has not filed a civil action under this section...the Commission...shall so notify the person aggrieved and...a civil action may be brought against the respondent named in the charge..."*

Subsection (b), [42 U.S.C. 2000e-5(b)], indicates that a charge is the instrument alleging an unlawful employment practice against an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs. It is quite clear that this foregoing list of entities, constitutes the exclusive list of organizations subject to Title VII of the Civil Rights Act of 1964. This is consistent with 42 U.S.C. 2000e-2 and 2000e-3 which sets forth the scope of unlawful employment practices, and only the foregoing list of entities is mentioned.

The SSEU WELFARE FUND is not in fact an employer, employment agency, labor organization, or joint labor-management

committee controlling apprenticeship or other training, i.e., not one of the entities explicitly listed in the Act. Therefore, it cannot commit an unlawful employment practice and a civil action may not be brought against it pursuant to the Civil Rights Act of 1964.

POINT V

THE COMPLAINT IS FATALLY DEFECTIVE BECAUSE OF NON-COMPLIANCE WITH F.R.C.P.8(A) IN THAT:

(a) WICGU FAILED TO ALLEGE THAT IT HAD A CAUSE OF ACTION UNDER TITLE VII IN ITS OWN RIGHT; FAILED TO NAME ITS MEMBERS AS REPRESENTATIVE PARTIES REQUIRED BY F.R.C.P. RULE 23.2;

(b) PLAINTIFFS IN ACTION AGAINST SSEU AND SSEU WELFARE FUND FAILED TO ALLEGE ISSUANCE OF "*RIGHT TO SUE*" LETTERS PRIOR TO INSTITUTION OF SAID ACTION;

(c) PLAINTIFFS FAILED TO PLEAD FACTS SUPPORTING JURISDICTIONAL PREREQUISITES NECESSARY IN CLASS ACTIONS OF (1) NUMEROSITY, (2) COMMONALITY, (3) REPRESENTIVITY, AND (4) TYPICALITY;

(d) PLAINTIFFS IN ACTION AGAINST SSEU FAILED TO PLEAD THAT THEY HAD RECEIVED PAYMENT FOR DISABILITIES UPON WHICH ACTION WAS BASED AND THEREFORE HAD NO CAUSES OF ACTION PERSONALLY IN THEIR OWN RIGHT AND THEREFORE COULD NOT SUE AS REPRESENTAIVE OF A CLASS WHO HAVE NOT BEEN SO PAID;

(e) PLAINTIFFS FAILED TO PLEAD IN ACTIONS AGAINST SSEU AND SSEU WELFARE FUND THAT THEY HAD FILED CHARGES AGAINST SAID DEFENDANTS WITH E.E.O.C. NAMING THEM AS SUCH; NOR EXHAUSTION OF THEIR REMEDIES UNDER TITLE VII;

(f) PLAINTIFFS IN ACTION AGAINST SSEU AND SSEU WELFARE FUND FAILED TO PLEAD THAT DEMAND HAD BEEN MADE FOR PAYMENT OF DISABILITY BENEFITS PRIOR TO INSTITUTION OF ACTION;

(g) PLAINTIFFS FAILED TO MAKE A TIMELY MOTION UNDER RULE 11A(c) OF THE RULES OF THE DISTRICT COURT FOR A DETERMINATION UNDER F.R.C.P. RULE 23(c)(1) FOR A CLASS DETERMINATION, A DEFECT PRECLUDING THE MAINTENANCE OF THE ACTION AND PROSECUTING THIS APPEAL.

This point covers fatal procedural defects in pleading and practice by Appellants not covered elsewhere in this brief with respect to the substantive law issues pertaining thereto. Such defects are so numerous and so basic as to sustain dismissal of the complaint in and of themselves.

In POINT II of this brief it was pointed out as a matter of substantive law WICGU and the individual plaintiffs alleging causes of action against the SSEU and the SSEU WELFARE FUND lacked capacity to sue; had no causes of action and were improper parties to maintain a class action.

In POINT III the matter of substantive law pertaining to the jurisdictional prerequisite of the issuance of "*right to sue*" letters *prior* to the institution of the action and the necessity of demand and refusal were established.

In POINT IV the matter of substantive law pertaining to a welfare fund *not* being subject to Title VII was reviewed.

With respect to these issues of substantive law:

A. WICGU was required to and failed to plead:

(1) the grounds upon which the Court's jurisdiction depends (F.R.C.P. Rule 8(a)(1); (Local Rule 11A);

(2) facts that the WICGU was entitled to relief in its own right and the issuance of "*right to sue*" letters (F.R.C.P. Rule 8(a)(2);

(3) that the alleged class of plaintiffs against SSEU and SSEU WELFARE FUND was

proper because of (i) numerosity, (ii) common questions of law or fact, (iii) claims are typical, and (iv) the representative parties will fairly and adequately protect the class (F.R.C.P. Rule 23(a); Local Rule 11A(2);

(4) as an alleged unincorporated association the name(s) of certain of its members as representative parties (F.R.C.P. Rule 23.2) Local Rule 11A(2)(i)(ii)(iii)(iv) and (v);

B. WICCU was required to and failed within sixty (60) days after filing the complaint to move for a class determination (F.R.C.P. Rule 23(c) (Local Rule 11A(c).

C. The remainder of the plaintiffs alleging causes of action against the SSEU and SSEU WELFARE FUND namely, SHAH, PADWEE, ZISES, MILLS, PASS and BLITZ (six in number) were required to and failed to plead:

(1) the grounds upon which the Court's jurisdiction depends (F.R.C.P. Rule 8(a)(1); (Local Rule 11A);

(2) facts that:

(a) they had filed charges with the E.E.O.C. against the SSEU and SSEU WELFARE FUND (F.R.C.P. Rule 8(a)(1)(2);

(b) the exhaustion of their remedies before EEOC under F.R.C.P. Rule 8(a)(2) Title VII;

(c) that "*right to sue*" letters were issued to them prior to the institution of the action (F.R.C.P. Rule 8(a)(1)(2);

(d) demand for payment [2/] prior to

2/ It should be observed that plaintiffs, PADWEE and SHAH were paid in fact and therefore were improper representatives of a class of others who had not so been paid (F.R.C.P. Rule 8(a)(2)(3); F.R.C.P. Rule 11A(2)(iii)(iv)(v); F.R.C.P. Rule 23(b)(2).

institution of the action and refusal (F.R.C.P. Rule 8(a)(1)(2);

(3) that the alleged class of plaintiffs against the SSEU and SSEU WELFARE FUND was proper because of (i) numerosity (ii) common questions of law or fact (iii) claims are typical and (iv) the representative parties will fairly and adequately protect the class (F.R.C.P. Rule 23(a); Local Rule 11A(2);

D. The said individual plaintiffs were required to and failed within sixty (60) days after filing the complaint to move for a class determination (F.R.C.P. Rule 23(c); Local Rule 11A(c).

Plaintiffs SHAH and PADWEE, having received disability benefits from the SSEU WELFARE FUND (115a, 116a) are not in the same situation as those who did not receive such payment. A representative plaintiff must have claims typical of those of the class, *Berland* v. *Mack*, 48 F.R.D. 121 (S.D. N.Y., 1969); *Richard* v. *Cheatham*, 272 F. Supp. 148 (S.D.N.Y., 1967); *Kramer* v. *Union Free School Distr. No. 15*, 282 F. Supp. 70 (E.D.N.Y., 1968); *State of W. Vir.* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y., 1970) aff'd 440 F.2d 1079 (2nd Cir., 1971); *Calabria* v. *Assoc. Hosp. Service*, 60 F.R.D. 498 (S.D.N.Y., 1973). Additionally these two plaintiffs, as a result of the payments to them, are not typical, in that they have sustained no injury or discrimination, *Wilson* v. *Kelley, supra*. In fact, they are not even members of the alleged class, *Congress of Racial Equality* v. *Comm.*, 270 F. Supp. 537 (D.C. Md., 1967); *House* v. *City of Grenada*, 267 F. Supp. 19 (N.D. Miss., 1966).

These same points apply to Plaintiffs PASS and BLITZ. Additionally assuming that these two named Plaintiffs became disabled, their disability due to pregnancy would have occurred after January 1, 1973. Therefore, they were eligible for disability benefits under the Plan of the SSEU WELFARE FUND. Of course, they would have had to make application to the SSEU WELFARE FUND for this benefit. They do not allege that they did so. Failure to plead demand and refusal in their case, is an unforgiveable defect, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *McDonald* v. *General Mills, Inc.*, 7 FEP Cases 66 (D.C. Cal., 1974). Further, their eligibility for benefits means that their claims are not typical of the claims of the alleged class; that they have sustained no injury, damage or discrimination, and are not actually members of the proposed class.

The provisions of Local Civil Rule 11A are clear. Rule 11A(c) required the plaintiffs to have moved the Court for a class determination within sixty (60) days after the filing of the pleading asserting a claim for a class, in this case, the Complaint. The Complaint herein was filed on January 17, 1974. The sixty days expired on March 18, 1974. Defendants are required to move for a dismissal, under Rule 11A within thirty (30) days after March 18, 1974, and *did* so.

> *"The public business of the court... has been hampered and delayed. The purpose of Rule 11A(c) and (d) is to prevent the parties in a class action from impeding the course and progress of the litigation by*

failing to move for a class action determination." Walker v. Columbia University 7 FEP Cases 100, 101 (S.D.N.Y., 1/21/74).

Plaintiffs would include in the class, along with females who became pregnant, females who were capable of becoming pregnant.

The SSEU WELFARE FUND pays no disability benefits to dependents or spouses regardless of the reason for the disability. Obviously, therefore, this part of the alleged class can show no discrimination, much less injury or damage.

In addition, females who may have been capable of becoming pregnant, but who did not become pregnant, can show no disability of any kind. This part of the alleged class can show no injury, damage or discrimination. A showing of injury and harm is necessary. *Wilson* v. *Kelley*, 294 F. Supp. 1005 (N.D. Ga., 1968), aff'd. 393 U.S. 266 (1968).

The Court should also consider the practical impossibility of determining who is or was capable of becoming pregnant.

It is submitted that in order for a court to authorize a class action, the court must be strongly convinced that the named plaintiffs will fairly and adequately represent the interests of the alleged class, as inadequate representation would seem to violate the "*due process*" rights of absent class members, *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Mersey* v. *First Republic Corp. of America*, 43

F.R.D. 465 (S.D.N.Y., 1968); *Feliciano* v. *Romney*, 363 F. Supp. 656 (S.D.N.Y., 1973).

Those plaintiffs asserting claims against the SSEU and SSEU WELFARE FUND have committed such fatal procedural defects and engaged in omissions which have demonstrated their inability to fairly and adequately protect and represent absent class members.

POINT VI

THE EXCLUSION OF PREGNANCY AND RELATED CONDITIONS IN AND OF ITSELF IS NOT PROSCRIBED DISCRIMINATION UNDER TITLE VII OR THE 14th AMENDMENT

(a) DISCRIMINATION BETWEEN SEXES CAN ONLY RESULT IF ONE SEX OR THE OTHER RECEIVES GREATER OR LESSER BENEFITS WITH RESPECT TO THE SAME SUBJECT MATTER SO THAT DISPARITY OF BENEFITS WITH RESPECT TO THEIR COMMON SUBJECT MATTER RESULTS

(b) A CONDITION OR STATE OF BEING NOT COMMON TO BOTH SEXES CANNOT RESULT IN DISCRIMINATION SINCE THE LACK OF COMMONALITY PRECLUDES DISPARITY OF TREATMENT WITH RESPECT THERETO

(c) THE STANDARD TO BE APPLIED IN "*DISCRIMINATION*" CASES IS THE SAME WHEN APPLIED TO THE 14th AMENDMENT OR TITLE VII

(d) INVIDIOUS DISCRIMINATION MEANS INSIPID, INTENTIONAL AND ARBITRARY DIFFERENTIAL TREATMENT DESIGNED TO FAVOR ONE GROUP OVER ANOTHER WITH RESPECT TO THE SAME THING

(e) IN ORDER TO COMPLY WITH F.R.C.P. 8(a) THE COMPLAINT IN A SEX DISCRIMINATION CASE UNDER TITLE VII *MUST* ALLEGE FACTS CONSTITUTING INTENTIONAL INVIDIOUS DISCRIMINATION.

This appeal arises as a result of the Hon. Whitman Knapp dismissing the complaint *sua sponte* for legal insufficiency after plaintiffs-appellants had declined to amend their complaint to allege facts constituting invidious discrimination as determined by Judge Knapp to be necessary as a consequence of the opinion of the United States Supreme Court decided in *Geduldig* v. *Aiello*, (ibid).

Judge Knapp's opinion and order in this case, reported in 8 Fep. Cases 529, set forth in reasoned logic several alternative dispositions, which he concluded were mandated as a result of *Aiello*. He reasoned, and correctly so, that absent allegations of fact constituting invidious discrimination, the complaint was legally insufficient. He afforded appellants an opportunity to amend and appellants refused. He therefore dismissed the complaint with prejudice.

One of the inherent problems in this case is that appellants have confused the issues, parties and procedures to such an extent that one of the central issues, namely what the Supreme Court actually held in *Aiello*, has become obscured. It is therefore necessary to refocus upon the central issue. To do so, it becomes necessary to review how *Aiello* arose.

In 1946 California established a disability insurance program that pays benfits to persons in private employment who temporarily are unable to work because of disability not covered by workmen's compensation. The program was funded entirely from contributions deducted from employee's wages.

The program excluded "*any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.*"

The District Court found that the exclusion was not based upon a classification having a rational and substantial relationship to a legitimate state purpose observing that the increased costs could be covered by changing the contribution rate. On such basis the District Court found that the pregnancy exclusion violated the Equal Protection Clause.

The Supreme Court made the following pertinent observations:

1. The state intended to establish a benefit system to function essentially in accordance with insurance concepts.

2. The state's commitment over the years was not to increase the contribution rate.

3. A *totally* comprehensive program would be substantially more costly and/or result in *a lower scale of benefits*.

4. Nothing in the Constitution requires the state to subordinate or compromise its legitimate interests soley to create a *more* comprehensive program.

5. The state has legitimate interests in maintaining the self-supporting nature of its program (a) keeping benefit payments at an adequate level for *covered* disabilities and (b) maintaining the contribution rate at a level not unduly burdensome.

6. There was no evidence that the *selection of the risks insured* discriminated against any (a) definable group, or (b) class in terms of the *aggregate* risk protection derived by *that* group or class from that *program*.

7. There was no *risk* from which men are protected and women are not.

8. There was no *risk* from which women are protected and men are not.

The *dissenters* would have found that singling out

for less favorable treatment a gender-linked disability peculiar to women creates a double standard for disability compensation i.e., a limitation imposed upon disabilities for which female workers may recover, but men receive compensation for *all* disabilities suffered.

The *majority*, however, in footnote 20, rebutted the dissenters' sex-discrimination argument.

The majority stated that the case did not involve *"discrimination based upon gender* ***as such.***" (Emphasis added). While it is true that only women can become pregnant, the Court noted it did not follow that every classification concerning pregnancy was a sex-based classification. The Court held that absent a showing that distinctions involving pregnancy were *pretextual*, lawmakers were free to include or exclude pregnancy from coverage.

The Court then held that the lack of identity *between* pregnancy and gender as such were clear under the challenged program because the program divided potential recipients into two (2) groups; (1) pregnant *women*, and (2) non-pregnant *persons*. While the first group was exclusively female, the second included members of both sexes and therefore the fiscal and actuarial benefits of the *program* accrue to members of both sexes.

The basic dispute between the majority and the dissenters concerned the standard by which to review the

program. The Supreme Court has treated statutes and programs having a *racially* discriminatory effect as inherently suspect, but there has *not* been a majority for the proposition that statutes and programs having a sexually discriminatory effect be evaluated the same way. (see dissenting opinion, *Aiello*)

Judge Knapp took particular note of the rebuttal to the dissent as enunciated in footnote 20 and applied the holding of the majority to the instant case. He gave recognition to the finding of the Supreme Court that "*to provide adequate benefits for some disabilities rather than inadequate benefits for all*" was wholly non-invidious and legitimate reasons for not wanting a more comprehensive program. He further gave credence to the Supreme Court's finding that there was no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class as the exclusion was not based because of gender "*but merely removes one physical condition --pregnancy--from the list of compensable disabilities*" and that the key to the *Aiello* decision was the flat statement that distinction involving pregnancy do not constitute discrimination because of sex or gender.

Appellants contend that Judge Knapp is in error and that he has misconstrued *Aiello* by requiring them to plead intentional invidious discrimination rather than merely permitting them to plead "*disproportionate impact upon women,*" which appellants assert is *prima facie* proscribed sex discrimination and they cite *Griggs* v. *Duke Power Co.*, 401 U.S.

424 as the authority for this all-inclusive generalization. However, the case does not stand for the proposition ascribed to it.

In the first instance, *Griggs* was a *race* discrimination case and *not* a *sex* discrimination case. Secondly, a reading of *Griggs* reveals that there had been a prior history of intentional race discrimination. *"The District Court found that prior to July 2, 1965 the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant."* The Court also found that on July 2, 1965, the date on which Title VII took effect, a further requirement of new employees became effective, namely the registering of satisfactory scores on two professionally prepared aptitude tests which the Court found were not directed or intended to measure ability to learn to perform a particular job or category of jobs. The District Court had also found at page 428 *"...that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct ceased."*

The Court then went on to hold at page 430, *"Under the Act, practices, procedures, or tests neutral on their face, and even neutral of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."* So *Griggs* dealt with an intentional racial discrimination being perpetuated by effect of impact. It did not stand for the converse as appellants

contend, that impact alone established proscribed discrimination. It was the perpetuation of the prior intentional discrimination which lay as the basis of the case.

Appellants also cite *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86. The Court referred to its holding in *Griggs*, *"'The Act proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'"* The Court then went on at page 92:

> *"It is equally clear, however, that these principals lend no support to petitioners in this case. There is no indication in the record that Farah's policy against employment of aliens had the* ***purpose*** *or effect of discriminating against persons of Mexican national origin."* (Emphasis added)

The root therefore again lay in intentional discrimination by design or effect. If this were not clear enough the Court stated at page 93:

> *"The Commission's guidelines may have significance for wide range of situations, but not for a case such as this where its very* ***premise****--that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin--is not borne out."* (Emphasis added)

Judge Knapp, in commenting on three possible courses of action for him to take, noted that *"having come to his conclusion to the effect of Aiello"*, the complaints should be dismissed with leave to replead *"invidious discrimination."* While F.R.C.P. 8(a) as interpreted by the Supreme Court in *Conley* v. *Gibson* (1957) 355 U.S. 41, 47-48,

78 S.Ct. 99, 2 L Ed 2nd 80, 25FR Serv 8a.25, Case 2, generally does not require a claimant to set out in detail the facts upon which he bases his claim, but rather a short and plain statement of the claim that will give the defendant "*fair notice*" of what the plaintiff's claim is and the grounds upon which it rests, there is nevertheless an exception for cases brought under Civil Rights Act.

In *Valley* v. *Maule*, *Ingalls* v. *Maule* (D. Conn. 1968) 297 F. Supp. 958, 13 FR Serv. 2d 8a.24 Case 1, the Court stated:

> *"As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Act. The reason for this exception is clear. In recent years there has been an increasingly large volume of cases brought under Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants --public officials, policemen and citizens alike--considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation."*

POINT VII

SINCE THE DISPUTED POLICY OF THE PLAN OF THE SSEU WELFARE FUND WAS CHANGED JANUARY 1, 1973, MORE THAN A YEAR PRIOR TO THE INSTITUTION OF THE ACTION, MAINTENANCE OF THE ACTION SHOULD HAVE BEEN REJECTED AS "*MOOT*".

Plaintiff-Appellants concede at page 5 of their original brief that "*the disability plan of the defendant Social Services (sic) Employees Union Welfare Fund (38a-39a) contained a similar exclusion prior to its amendment February 1, 1973.*" Said appellees set forth in their motion to dismiss at page 106 a of the Appendix that "*if a cause of action existed against said Defendants, it existed only for the nine (9) month period from March 24, 1972, when the Civil Rights Act of 1964 was amended to include Defendant, Social Service Employees Union Local 371, to January 1, 1973, when Defendant Social Service Employees Union Local 371 Welfare Fund amended its plan of benefits to remove the exclusion of pregnancy and pregnancy related illnesses from its disability benefit and it is therefore practical to bring before the Court the alleged class of plaintiffs.*"

In Paragraph 11 of the affidavit of GERALD J. BARRE (page 175 of the appendix) it appears and has not been controverted that:

> "*Of the six plaintiffs (excluding WICGU) which have pleaded against these defendants (Social Service Employees Union Local 371 and Social Service Employees*

> *Union Local 371 Welfare Fund' five never filed charges with E.E.O.C. and the one which did against the Fund (PADWEE) with respect to whom we are informed by plaintiffs will have a right to sue letter at the time of the hearing of this motion, has been paid and thus her claim in any event should be dismissed.*

For further facts relating to this payment, note affidavit of FREDERICK H. CHARAP, paragraph 4, at page 116a of the appendix, and 183a, 186a 188a 190a, 192a, 194a.

In *Locke* v. *Board of Public Instruction of Palm Beach Co.*, 8 EPD ¶9635, the Court addressed itself to "*mootness*" and found at page 5703:

> *"Furthermore, a new maternity leave policy was adopted on December 12, 1972, and the old maternity leave which Mrs. Locke came under is no longer in effect...Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. It has frequently been repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them...To be cognizable in a federal court a suit 'must be definite and concrete, touching the legal relationships of parties having adverse legal interests ...It must be a real and substantial controversy admitting of specific relief to a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts'...Mootness is a jurisdictional question because federal courts are not empowered tc decide moot questions or abstract propositions."*

Clearly, none of the above criteria has been met by the plaintiffs with respect to the SOCIAL SERVICE EMPLOYEES

UNION LOCAL 371 and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND. Those who have applied have been paid.

CONCLUSION

For all of the foregoing reasons the SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 and SOCIAL SERVICE EMPLOYEES UNION LOCAL 371 WELFARE FUND respectfully submit that the order of the District Court dated October 10, 1974, dismissing the complaint with prejudice be affirmed in its entirety.

Respectfully submitted,

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May 14, 1977

ADDENDUM

Constitutional Provisions, Statutes, Rules and Regulations Involved

The FOURTEENTH AMENDMENT to the United States Constitution provides in relevant part:

"Section 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title VII of the Civil Rights Act of 1964 as amended, 42 USC § 2000(e) 2. *et seq.*, provides in relevant part:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-3, provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(b) provides:

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and

promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(f) (1) provides:

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney

Rule 8(a) of the Federal Rules of Civil Procedure provides:

Rule 8. General Rules of Pleading
(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 23 of the Federal Rules of Civil Procedure provides:

Rule 23. Class Actions
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class ation with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 23.2 of the Federal Rules of Civil Procedure provides:

Rule 23.2. Actions Relating to Unincorporated Associations
An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Rule 11A of the Rules of the United States District Court for the Southern District of New York provides:

Rule 11A. Class Actions
In any action sought to be maintained as a class action:

(a) The complaint shall bear next to its caption the designation "Complaint–Class Action." Comparable designations shall appear on any other pleading (counterclaim or cross claim) asserting a claim for or against a class.

(b) The complaint (or other pleadirg asserting a claim for or against a class) shall contain next after the jurisdictional grounds and under the separate heading "Class Action Allegations":

(1) A reference to the specific part or parts of Rule 23(b), Fed.R.Civ.P., under which it is claimed that the action is properly maintainable as a class action.

(2) Appropriate averments to justify such claim–including, but not necessarily limited to,

(i) the number (or approximate number) of members of the class,

(ii) a description of the members of the class,

(iii) the basis upon which it is claimed that the party asserting the claim will fairly and adequately protect the interests of the class, or, if the claim is asserted against a class, that the named members of the class will fairly and adequately protect the interests of that class,

(iv) the question of law or fact claimed to be common to the class, and

(v) in actions claimed to be maintainable as class actions under subdivision (b) (3) of Fed.R.Civ.P. 23, averments to support the findings required by that subdivision, including those noted under (A), (B), (C) and (D) of the subdivision.

(c) Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed.R.Civ.P. 23(c) (1) as to whether the action is to be maintained as a class action and, if so, the membership of the class. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action averments, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where the determination is ordered to be postponed, a date will be fixed in the order for renewal of the motion before the same judge.

(d) If the party asserting the claim for or against a class fails to make a timely motion under subsection (c) of this rule, the opposing party shall move, within thirty (30) days after expiration of the time allowed for such motion to dismiss the action as a class action. In ruling upon such a motion, the court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances.

A 202 Affidavit of Personal Service of Papers

COURT OF APPEALS
SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

SSEU

WOMEN IN SITY GOVERMENT etc.
Plaintiffs-Appellants

- against -

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR etc.
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, Reuben A. Shearer, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030.

That on the 18th *day of* May, *19* 77 *at* see attached

deponent served the annexed Appellees Brief *upon* see attached

the palintiff-appellants *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* attorneys *herein,*

Sworn to before me, this 18th
day of May, *19* 77

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

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